



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Fund for Equal Access to Society
Matter of: B-228167
File: January 20, 1988
Date:

DIGEST

Contracting officer's finding that the protester was nonresponsible for award of a cost-reimbursement contract was reasonable, where it was based upon: (1) two inspector general audit reports which revealed numerous accounting and record-keeping deficiencies, as well as protester's possible financial problems, and (2) information provided by a firm listed in the protester's proposal as a reference (a prime contractor for whom the protester was a subcontractor doing similar work for the contracting agency) which showed record of poor prior performance by the protester.

DECISION

The Fund for Equal Access to Society (FEATS) protests the Department of Education's determination that it was nonresponsible with respect to request for proposals (RFP) No. 87-021. Issued on February 17, 1987, the RFP solicited proposals for a 4-year, cost-reimbursement contract to establish and operate a Federal Regional Resource Center that would assist six regional resource centers in delivering assistance to special education programs. Of the two proposals received in response to the solicitation, only FEATS' proposal was considered to be technically acceptable. However, the contracting officer rejected FEATS as nonresponsible on August 27, and canceled the solicitation. FEATS alleges that it is well qualified to perform this contract and that the contracting officer's nonresponsibility determination was unreasonable.

We deny the protest.

Pertinent regulations provide that federal contracts shall be awarded to responsible contractors only, and list several standards that the prospective contractor must meet. Federal Acquisition Regulation (FAR) §§ 9.103 and 9.104-1. Those standards include, among other things, having adequate financial resources to perform the contract, having a

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satisfactory performance record, and having the necessary organizational, accounting and operational controls. FAR § 9.104-1. The regulations put the burden on the prospective contractor to demonstrate its responsibility, FAR § 9.103(c), and dictate that in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. FAR § 9.103(b).

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must of necessity rely primarily on his or her business judgment. Firm Reis GmbH, B-224544, et al., Jan. 20, 1987, 87-1 CPD ¶ 72. While the determination should be based on fact and reached in good faith, the ultimate decision should be left to the discretion of the contracting agency because it must bear the brunt of any difficulties experienced during performance of the contract. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48 at 4, 5. The contracting officer also has broad discretion as to whether a preaward survey should be conducted and, if conducted, the degree of reliance to be placed on the results of the survey. Newport Offshore, Ltd., B-219013, et al., June 13, 1985, 85-1 CPD ¶ 683. Because of the broad discretion of the contracting officer in these matters, our Office generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of a reasonable basis for the determination. Pauline James & Assocs., B-220152, et al., Nov. 20, 1985, 85-2 CPD ¶ 573.

As FEATS has presented no evidence of bad faith on the contracting officer's part, the only question for resolution is whether the contracting officer's determination was reasonable, based upon the information available at the time that determination was made. Firm Reis GmbH, B-224544, et al., supra. We conclude that the contracting officer's determination that FEATS was nonresponsible was, in fact, reasonably based.

The contracting officer ordered a preaward survey of FEATS before making her responsibility determination. Accordingly, a representative of the Office of the Inspector General for Audit, Department of Education, visited FEATS' Washington, D.C., office and performed an on-site audit. This audit resulted in findings on August 13, that FEATS had several organizational and accounting/record-keeping deficiencies. Among other things, the Inspector General found that: (1) FEATS' fringe benefit rate might be understated since FEATS had been required to use money set aside for its pension plan to pay labor expenses due to lack

of other available funds; (2) FEATS' timekeeping system and travel cost policies were inadequate; (3) overhead rates could not be established due to inadequate financial records; (4) FEATS had not maintained proper labor distribution records to allocate labor costs to the various activities on which employees worked; (5) the president of FEATS had to pay support staff salaries from his personal funds on occasion due to lack of assets in FEATS' own accounts; and (6) FEATS did not have audited financial statements.

The contracting officer also reviewed a prior audit report from the Office of the Inspector General for Audit issued on February 24, 1986, in connection with FEATS' proposal on an earlier solicitation for similar work, which ultimately was canceled. This audit revealed a number of different, but related, deficiencies in FEATS' internal accounting control systems. While FEATS contends that these deficiencies were corrected by it prior to the second audit, the contracting officer believed it significant that FEATS' internal accounting procedures still were deficient in several areas long after FEATS had been advised of related deficiencies found in the previous audit. The contracting officer concluded that FEATS "... had not brought its record-keeping system up to a minimal professional standard required for undertaking a major cost reimbursement contract with a federal agency." The contracting officer also concluded that "[t]his failure to make substantial improvements in the year since the 1986 audit was provided to FEATS, raised further questions about FEATS' tenacity and will to perform acceptably."

In view of the audit findings, and noting that FEATS had requested advance payments in connection with the present procurement, the contracting officer became concerned that FEATS was experiencing financial problems and that FEATS might not have adequate financial resources to perform the contract properly. The Department of Education reports that, as the present procurement was for a cost-reimbursement contract, the deficiencies in accounting and record-keeping were critical to its decision that FEATS was not responsible.

Also, in order to check on FEATS' prior performance record, the contracting officer contacted the Director for Contracts and Grants of Utah State University, which had been a prime contractor doing similar work for the Department of Education. FEATS had performed some of the same services required in the present procurement for the Department of Education under a subcontract agreement with Utah State University, and FEATS had listed Utah State University as a reference in its proposal. The Utah State University

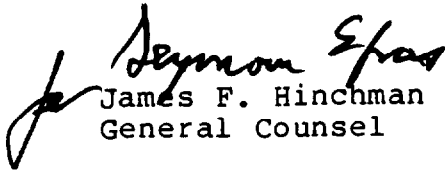
official stated that the university would be "extremely hesitant to engage in future contractual arrangements with FEATS." Among other things, this official indicated that: (1) FEATS had "suffered from cash flow problems"; (2) FEATS' performance in the training components of its subcontract had been "less than the quality expected"; (3) the university had had numerous discussions with the president of FEATS to make sure he devoted the amount of time for which he was obligated to the work; (4) Utah State University had found it necessary to assume certain tasks from FEATS concerning editing and production control of technical assistance guides in order to assure timely delivery and high-quality products; and (5) the university had advanced certain payments to FEATS under the subcontract agreement and had suffered numerous delays in receiving repayment.

FEATS contends that all of the record-keeping/accounting problems have either been corrected or are easy to correct, and that the contracting officer should have allowed it an opportunity to correct any remaining deficiencies before rejecting FEATS as nonresponsible. Furthermore, FEATS argues, much of the information provided by the Utah State University official is either false or can easily be explained. FEATS contends that the contracting officer should have allowed it an opportunity to refute this erroneous information or, at least, should have investigated further to ascertain the truth of the matter.

In our view, the contracting officer's determination of FEATS' nonresponsibility was reasonable. The above-enumerated deficiencies relate to many of the standards listed in FAR § 9.104-1 concerning responsibility, including adequacy of financial resources, prior performance, and adequacy of accounting and operational controls. We think the contracting officer had ample information to support her conclusion that FEATS did not meet the FAR standards. Although the protester urges that it should have been allowed to rebut or explain some of the negative information received by the contracting officer, we have specifically held that, since responsibility determinations are administrative in nature, not judicial, they do not require affording the affected firm notice and an opportunity to comment. Pauline James & Assocs., B-220152, et al., supra. Therefore, a contracting officer may base a determination of nonresponsibility upon the evidence of a record without affording the offeror an opportunity to explain or otherwise defend against the evidence. Id.; Firm Reis GmbH, B-224544, et al., supra.

Regarding FEATS' charge that the information provided by Utah State University is misleading, we point out that FEATS

listed the university as a reference in its business proposal. Under FAR § 9.104-1(c), and our prior cases, the circumstances surrounding an offeror's prior performance should be considered as one of several factors when reviewing a prospective contractor's responsibility. Firm Reis GmbH, B-224544, et al., supra. Furthermore, there is no duty placed upon the contracting officer to investigate independently to ascertain the accuracy of information provided by the protester's own reference source. See Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235.


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